IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 508

THELMA LEVY, in her capacity as administratrix of the succession of LOUISE LEVY and as the tutrix of and on behalf of the minor children of LOUISE LEVY, said children being: RONALD BELL, REGINA LEVY, CECILIA LEVY, LINDA LEVY, and AUSTIN LEVY.

—v.—

The STATE OF LOUISIANA through the CHARITY HOSPITAL OF LOUISIANA at NEW ORLEANS BOARD OF ADMINISTRATORS and W. J. WING, M.D. and A.B.C. INSURANCE COMPANIES.

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of Louisiana refusing to grant certiorari from the decision of the Court of Appeal, Fourth Circuit, Parish of Orleans, which affirmed the dismissal by the Civil District Court for the Parish of Orleans of appellant's petition for damages for wrongful death. Appellant submits this Statement to show that the Supreme Court has jurisdiction of the appeal and that a substantial question is presented. The appeal is taken pursuant to Title 28 of the United States Code, Section 1257(2).

Appellant filed an action for wrongful death under La. Civ. Code art. 2315 in the Civil District Court for the Parish of Orleans on December 16, 1964. The District Court dismissed the action on January 31, 1966. The Court of Appeal, Fourth Circuit, affirmed this dismissal on November 7, 1966. A timely application for rehearing was denied on December 5, 1966. The Louisiana Supreme Court denied the petition for certiorari or writ of review on January 20, 1967.

Opinions Below

The denial of certiorari by the Supreme Court of Louisiana is reported at 250 La. 25, 193 So. 2d 530, and is set out *infra* at p. 19. The opinion of the Court of Appeal, Fourth Circuit, Parish of Orleans is reported at 192 So. 2d 193, and is set out *infra* at pp. 16-18. The Civil District Court for the Parish of Orleans wrote no opinion; its decision is found in the judgment, dated January 31, 1966, contained in the Appendix as set out at pp. 13-15, *infra*.

Jurisdiction

The appellants filed their notice of appeal to this Court in the District Court and the Court of Appeal on April 19, 1967. On June 6, 1967, Hon. R. T. McBride of the Louisiana Court of Appeal, Fourth Circuit, enlarged appellant's time to file this Jurisdictional Statement and to docket the appeal to and including August 16, 1967.

Statute Involved

Louisiana Civil Code article 2315 provides as follows:

"The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

"The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

"As used in this article, the words 'child,' 'brother,' 'sister,' 'father,' and 'mother' include a child, brother, sister, father and mother, by adoption, respectively."

The Question Presented

Whether Louisiana Civil Code article 2315 as construed and applied is invalid under the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution because it denies a right of action to illegitimate children for the wrongful death of their mother solely on their status as persons of illegitimate birth.

Statement of the Case

Appellant brought this action under La. Civ. Code art. 2315 on behalf of the five minor children of the late Louise Levy for her wrongful death. The defendants were the State of Louisiana, through the Charity Hospital of New Orleans Board of Administrators and W. J. Wing, M.D., and the A.B.C. Insurance Companies, later designated as the Interstate Fire and Casualty Company (R. 5-9, 37).

The Third Supplemental and Amending Petition, whose allegations must be taken as true for the purposes of this appeal, stated that the five illegitimate children of Louise Levy lived with her, and she treated them as well as any mother would treat her legitimate children. She worked as a domestic servant to support them and either took them or had them taken to Catholic Mass every Sunday. In addition, she had them enrolled in a parochial school at her own expense, even though she could have sent them to the free public school (R. 50-52).

As alleged in the Petition, on March 12, 1964, Louise Levy came to the Charity Hospital in New Orleans with symptoms of tiredness, dizziness, weakness, chest pain and

slowness of breath. Dr. Wing, to whom she was assigned, purportedly examined her, but he failed to take her blood pressure, make a proper check of her eyes or conduct any other test, such as urinalysis, which would have revealed her condition. He then sent the patient home with tonic and tranquilizers. She returned on March 19 with severe symptoms. Dr. Wing merely looked at her, told her that she was not taking the medicine, and made an appointment for her to see a psychiatrist on May 14. On March 22 she was brought to the hospital in a comatose condition, and at that time an adequate examination resulted in the correct diagnosis of her illness as hypertension uremia. She died on March 29, 1964 (R. 5-9).

Dr. Wing and the Interstate Fire and Casualty Company moved to dismiss the petition on the grounds that petitioner had not qualified as tutrix, and that Article 2315 allowed no cause or right of action as to illegitimates (R. 20-21). The procedural issue was cleared by appellant's qualification as tutrix in separate proceedings. The District Court then rendered judgment in favor of the defendants and the suit was dismissed[1] (R. 66-67). On appeal, the Court of Appeal affirmed on the ground that illegitimate children have no cause of action for the wrongful death of their mother. The Court of Appeal specifically rejected appellant's claim that the denial of a cause of action under Article 2315 deprived the children of due process and equal protection under the Fourteenth Amendment (R. 112-115). Appellant petitioned the Supreme Court

[1] The State of Louisiana was dismissed from the action and exceptions relating to the Charity Hospital were continued. No appeal was taken with respect to either of these parties. The judgment as to Dr. Wing and the Interstate Fire and Casualty Company was final in all respects.

of Louisiana for a writ of certiorari on constitutional grounds. The Supreme Court denied the writ, finding "no error of law in the judgment of the Court of Appeal" (R. 116).

The Question Is Substantial

The question whether Louisiana can apply its wrongful death statute to deprive children of a cause of action for damages for the negligent death of their mother on the sole ground that they are illegitimate is plainly substantial under governing decisions of this Court.

1. The test that the Court has employed under the equal protection clause, enunciated as recently as last Term, is "whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination." *Loving* v. *Virginia,* 87 Sup. Ct. 1817, 1823 (1967). See also *McLaughlin* v. *Florida,* 379 U. S. 184 (1964); *Carrington* v. *Rash,* 380 U. S. 89 (1965); *Harper* v. *Virginia State Board of Elections,* 383 U. S. 663 (1966).

The purpose of wrongful death statutes is to reimburse those who stand to lose through the death of another, usually a close relative, whether through contributions based on past earnings or through loss of services, training, nurture, education and guidance. See Speiser, Recovery for Wrongful Death iii (1967). Judged by this purpose, the denial to illegitimate children of a right to recover for the wrongful death of their mother is certainly "arbitrary and invidious." The children here were as close to their mother as any children born in wedlock could be. They were fully dependent on her for the necessities of life as well as the vital intangibles of "training, nurture,

and guidance." And they now are losing as much as—indeed, because of the absence of a father, probably more than—legitimate children in comparable circumstances. The classification of the Louisiana statute which in effect treats the illegitimate as a "constitutional non-person,"[1a] is, accordingly, not "reasonable in light of its purpose," *McLaughlin* v. *Florida, supra* at 191; *Carrington* v. *Rash, supra* at 93, and it denies these illegitimate children the equal protection of the laws.[2]

2. The Louisiana Court of Appeal justified its discriminatory application of the wrongful death act on the ground that "it discourages bringing children into the world out of wedlock." *Infra* p. 17. But the court cited no evidence to support this proposition, and what statistics exist serve to belie it. Thus, in the face of the pattern of legislation penalizing illegitimates, the rate of births out of wedlock has climbed steadily. In 1950, the rate of illegitimacy in the United States was approximately one out of every twenty-five live births. In 1960 the ratio was approximately one out of nineteen. In 1964 out of a little more than 4 million live births, 275,700 (one in fifteen) were illegitimate.[3] In Louisiana, the rate of illegitimacy has increased

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[1a] Cf. Fortas, Equal Rights—For Whom?, 42 N. Y. U. L. Rev. 401, 408 (1967).

[2] In a closely analogous area, two courts have recently held that the denial to a wife of the right to sue for loss of consortium of her husband, when the husband may sue for loss of the consortium of his wife, violates the wife's right to equal protection of the laws. See *Owens* v. *Illinois Baking Corp.*, 260 F. Supp. 820 (W. D. Mich. 1966); *Clem* v. *Brown*, 207 N. E. 2d 398 (Ohio Ct. of Common Pleas, 1965).

[3] Statistical Abstract of the United States, 47-49 (1966). See Foster and Freed, Unequal Protection: Poverty and Family Law, 42 Ind. L. J. 192, 220 (1967).

as well and stands at a level which is significantly higher than the national average. In 1960, out of 90,126 live births, 8,248 (approximately 1 in 11) were illegitimate. In 1964, out of 86,060 live births, 9,567 (approximately 1 in 9) were illegitimate.[4]

Moreover, it is unreasonable to harm a class of blameless persons in order to control the conduct of persons not within the class. The discriminatory legislation affects the child, not the parents, and as such is constitutionally defective. In *Oyama* v. *California,* 332 U. S. 633 (1948), California had applied its Alien Land Law to escheat land claimed by the son of an alien. This Court invalidated the law on the ground that extraordinary procedural burdens were imposed upon the son depriving him of the equal protection of the laws. The Court held that an American citizen could not be deprived of land solely on the basis of his father's nationality.[5]

The justification of the Louisiana court is not only contradicted by statistical evidence, but by common sense. It would be truly remarkable if persons contemplating or in the process of producing a child out-of-wedlock would be deterred by the possibility that the child would not be able to recover for their wrongful death. Surely such a fanciful assertion, which is at the root of the opinion below, will not suffice to justify the denial of a "property right" (La. Civil Code Article 2315, *supra* at 3) to children

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[4] Report of the Division of Public Health, p. 21, Louisiana State Board of Health (1964).

[5] The Louisiana statute also contravenes the biblical injunction that "the son shall not bear the iniquity of the father with him." Ezekiel 18 :23.

who have lost their mother through another's wrongful conduct.[6]

The unsupported assertion that denial of recovery to illegitimates serves a deterrent purpose is particularly indefensible because the state plainly had the burden of supporting the statutory classification. This case does not involve a statute regulating economic interests where distinctions are presumptively valid and can be upset under the equal protection clause only by a strong showing. Compare *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955) with *Morey* v. *Doud*, 354 U. S. 457 (1957).

The state legislation here discriminates against individuals because of ancestry, which like color is a condition of birth wholly beyond their control.[7] In the absence of

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[6] The manifold forms of discrimination against illegitimates that exist in virtually every state are coming under increasing attack. See, e.g., Krause, Equal Protection for the Illegitimate, 65 Mich. L. Rev. 477, 492 (1967); Foote, Levy and Sander, Cases on Family Law 72-73 (1966); Foster and Freed, Unequal Protection: Poverty and Family Law, *supra* at 220. But the constitutionality of discriminatory legislation in the areas of intestacy and support are not presented here; the instant case offers the most egregious example of invidious discrimination against this class.

Louisiana is the only jurisdiction that deprives an illegitimate child of an equal right to sue for the wrongful death of his mother. See Annotation, 72 A. L. R. 2d 1235, 1237 (1960); *Speiser, supra* at 589-590, n. 9. This is particularly shocking because the reasons generally offered to justify denial of benefits to illegitimates are irrelevant in a suit for the wrongful death of the mother. Maternity cannot be in issue, and illegitimacy has no bearing, as the facts of this case reflect, on the child's relationship with the mother. Moreover, the alleged justification of deterring immoral conduct is defective. Even if the parents are concerned with the rights of possible offspring, they are not likely to contemplate the possibility of their own death by the wrongful act of another person.

[7] These illegitimate children are being denied rights solely because of the accident of their birth. This Court has held that penalties cannot be imposed because of personal status involuntarily

any overriding state interest—which the state here has wholly failed to demonstrate—there should be no constitutional distinction with respect to this matter between discrimination based on illegitimacy and discrimination based on race. This is all the more true because statutes punishing illegitimates tend to fall most heavily on Negroes,[8] as in this case, and in some instances may have been designed to achieve this end. See Bell, Aid to Dependent Children, 181-86 (1965). Accordingly, the Louisiana statute is "highly suspect" and subject to "rigid scrutiny" in this Court. *Loving* v. *Virginia, supra; McLaughlin* v. *Florida, supra; Korematsu* v. *United States,* 323 U. S. 214 (1944). See also *Harper* v. *State Bd. of Elections, supra* at 669.

3. Louisiana's refusal to permit suit for wrongful death by illegitimate children is also objectionable on due process grounds. While the courts may not sit as super-legislatures and use the Fourteenth Amendment to strike down regulatory laws because they seem unwise, e.g., *Williamson* v. *Lee Optical Co., supra* at 488, where a statute involves an aspect of individual liberty, the due process clause requires a greater showing of a valid connection between a proper legislative purpose and the law designed to implement that objective. See *Griswold* v. *Connecticut,* 381 U. S. 479, 492 (1965) (Goldberg, *J.* concurring); *Poe* v.

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entered into. *Robinson* v. *California,* 370 U. S. 660 (1962); see also *Driver* v. *Hinnant,* 356 F. 2d 761 (4th Cir. 1966).

[8] In 1964, out of a total of 275,700 illegitimate births in the United States, 161,300 were non-white. This represents nearly one-fourth of all non-white births in the United States for that year. Statistical Abstract of the United States, *supra.* In Louisiana in 1964, out of a total of 9,567 illegitimate live births, 8,441 (88%) were non-white. Report of the Division of Public Health, *supra.*

Ullman, 367 U. S. 497, 542-44 (1961) (Harlan, *J.* dissenting); *Bolling* v. *Sharpe*, 347 U. S. 497, 499-500 (1954); *Meyer* v. *Nebraska*, 262 U. S. 390, 399-400 (1923).

The principal justification for the exercise of state police power in this area is the right of a state to regulate sexual activity, and specifically its power to discourage promiscuity. Another justification for these laws relies upon the promotion of marital stability and family unity, both of which are said to be threatened by forced support of illegitimates.

Neither of these theories is persuasive or constitutionally adequate to support the result in this case. In the first place, as pointed out above, there is no proof supporting the assumption that such measures will deter illegitimacy. And in view of the constitutionally objectionable criteria used to penalize illegitimate children—ancestry and blood relationship—the burden surely should rest on the state to demonstrate their effectiveness. *Loving* v. *Virginia*, *supra* at 1822. Secondly, even assuming effective deterrence, there is a substantial question whether the Fourteenth Amendment permits a state to penalize persons for the acts of others over whom they have no control. See Krause, Equal Protection for the Illegitimate, *supra* at 492; Cf. *Oyama* v. *California*, *supra*; *NAACP* v. *Overstreet*, 384 U. S. 118 (1966) (dissenting opinion).

CONCLUSION

For the reasons stated above, a substantial question under the Constitution is presented in this case, and jurisdiction should be noted.

Respectfully submitted,

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APPENDIX